

A photograph of a white helicopter with blue accents flying over a dense forest, spraying a white mist of pesticides. The helicopter is positioned in the upper right quadrant of the image. The background is a lush green forest with tall trees. The overall scene is captured from an elevated perspective.

Court Strikes Down Local Authority to Restrict Pesticides

OREGON JUDGE CITES STATE PREEMPTION OF LOCAL DEMOCRATIC DECISION MAKING

A Circuit Court judge in Lincoln County, Oregon has overturned a hard-won local ban on aerial spraying of pesticides, citing state preemption of any local ordinance in the state. In her late-September decision, Judge Sheryl Bachart wrote that Oregon's *Pesticide Control Act* "expressly and conclusively displaces any local ordinance regarding pesticide use. The intention of the legislature is apparent and unambiguous." She noted in her opinion that the Oregon Revised Statutes (the codified laws of the state of Oregon), Chapter 634.057 "prohibits local governments from making any ordinance, rule or regulation governing pesticide sale or use."

Local elected officials and residents are often surprised to learn that their authority, generally reserved for local political subdivisions under their local police powers, has been quietly taken away after extensive lobbying by the chemical industry. As the judge in this case points out, state legislatures exercise authority over their municipalities. They have, in most cases, acquiesced to the economic interests and powerful lobbying of the chemical industry.¹ Increasingly, as communities become aware of this attack on the local democratic process to adopt more stringent protections than that afforded by state law, they escalate the call to repeal state preemption. In stark contrast to the Oregon judge's decision is the Maryland Court of Special Appeals ruling in May (upheld on appeal) that Montgomery County, Maryland has the right to restrict pesticides more stringently than the state, and can now begin implementing its 2015 landmark law banning the cosmetic use of pesticides on all privately owned lawns and landscaped property in its jurisdiction.² It will not surprise those who follow this issue that the chemical industry, producers, and users (most prominently the chemical lawn care industry), are back in the Maryland statehouse seeking to overturn the

court decision with a law to preempt, which they have been trying to do for decades.

EXERCISING THE LOCAL RIGHT TO PROTECT HEALTH

Voters in Lincoln County, through a ballot initiative, approved the ban on the aerial spraying of pesticides (Measure 21-177) in 2017, the initiative having been spurred by the work of Lincoln County Community Rights (LCCR), a grassroots organization that "seeks to educate and empower people to exercise their right of local community self-government in matters that pertain to their fundamental rights, their natural environment, their quality of life, their health and their safety." In its advocacy for the initiative, the group cited both the harm done by aerial pesticide spraying to people and ecosystems, and the injustice of the laws—often drafted by corporations for approval by legislatures—that make it illegal for the people to protect their health and safety more stringently than state regulations.

Immediately after the 2017 vote—a "win" for the local community—commercial fisherman and timberland owner Rex Capri and Wakefield Farms, LLC, both of whom used aerial spraying on their properties (prior to the ban), filed a legal challenge to the ban ordinance, which has been largely in effect during the two years since the ordinance passed.

SQUELCHING LOCAL AUTHORITY

The basis of the lawsuit lay in their claims that Lincoln County (or any political subdivision of the state) lacks the authority to create such an ordinance, that local statutes cannot override state law, and that the ban is barred by state regulations governing the use of pesticides, forestry practices, and the "right to farm." The group that formed back in 2017 to oppose the

ban initiative, the Coalition to Defeat Measure 21-177, is pleased with the news. In response to the judge's ruling, the coalition's director, Alan Fujishin, said, "Pesticide use by Lincoln County's farmers, foresters, fishermen, vegetation managers and pest control professionals is already carefully regulated by the Oregon Department of Agriculture and supporting agencies—as it should be."

LCCR joined in the case of *Rex Capri and Wakefield Farms, LLC vs. Dana W. Jenkins and Lincoln County* as an intervenor-defendant. Rio Davidson, a member of LCCR, called the judge's ruling "heartbreaking." He noted that during the two-years-plus when the ban was in effect, most large companies shifted to ground application of pesticides; he now expects that most will revert to aerial spraying.

LCCR PLANS TO APPEAL THE RULING

LCCR asserts that Judge Bachart failed to consider the right of local self-government, and that this right must prevail against state preemption when exercised to protect health, safety, and welfare. LCCR also stated, "It is widely recognized that, under the Ninth Amendment to the U.S. Constitution, states have the authority to recognize and secure 'unenumerated' rights (rights not expressly stated in the Constitution), and thereby to establish greater rights at the state level than the protections provided under federal law.

In covering the Lincoln County case in 2017, Beyond Pesticides noted, "The case points to the legal conundrum that localities face in trying to protect their residents, lands, and resources from the assaults of pesticides, GMOs (genetically modified organisms), factory farms, fracking sites, or a host of other ills that communities may find objectionable because of health, safety, and/or environmental concerns. The tension between states' preemptive authority, and the emerging insistence on greater local control to protect its residents, goes to the very heart of not only how governments at state and local levels derive their authority in a democratic system, but also, how that authority is shared—or not."

THE U.S. SUPREME COURT DECISION

In 1991, the U.S. Supreme Court ruled, in *Wisconsin Public Intervenor v. Mortier*, that the federal pesticide law, FIFRA—the *Federal Insecticide, Fungicide and Rodenticide Act*—which regulates pesticide distribution, sale, and use, does not preempt local jurisdictions from creating more stringent pesticide regulation. Thus, it was ruled that FIFRA nowhere expressly supersedes local regulation. However, and critically, the court left intact the ability of states to preempt such regulations. The essential argument of localities, and of Beyond Pesticides, is that state preemption laws effectively deny local residents and decision makers their democratic right to better protection when a community decides that minimum standards set by state and federal law are insufficient

This tussle between "higher" and "lower" levels of government over the authority to regulate factors in public health and safety—that has played out across communities in the U.S.—goes to some of the fundamental principles on which the American democratic experiment is based. In 2012, Beyond Pesticides executive director Jay Feldman wrote, "This is a very interesting story in American democracy. How did we get to this point in the history of the [U.S.] that we have taken away the local police powers of our local jurisdictions to protect the local public health of our people? This challenges a basic tenet that this country is based on—local governance."

SUPPORTING AND TRACKING LOCAL ACTION

Beyond Pesticides has participated in many of the numerous efforts of localities to establish more stringent controls over pesticide use. Among them: In 2013, the Takoma Park, Maryland City Council passed a law that restricted use of cosmetic lawn pesticides on public and private property within the city; the Town of Ogunquit, Maine banned the use of synthetic pesticides and fertilizers on private property in 2014; Montgomery County, Maryland adopted a law that restricts to a permitted list the use of pesticides on public and private property in 2015; South Portland, Maine, followed by Portland, Maine have adopted ordinances that stop the use of lawn and landscape pesticides, except those that are compatible with organic land management. With state preemption looming, many jurisdictions have turned to the adoption of ordinances that limit the use of pesticides—either broadly or pesticide-specific—on public lands within their jurisdiction. There are 155 local ordinances that regulate the use of toxic chemicals in parks and playgrounds at this writing.³

All of these efforts represent the interest of the public in reducing the health and environmental threats from the use of toxic chemicals in their local communities. A study, "Anti-community state pesticide preemption laws prevent local governments from protecting people from harm" in the *International Journal of Agricultural Sustainability* (2019), finds that, "By eliminating the ability of local governments to enact ordinances to safeguard inhabitants from health risks posed by pesticides, state preemption laws denigrate public health protections."

END NOTES

- 1 Beyond Pesticides has written extensively on preemption of local authority. See *Groups Take on Crisis in Democracy*, 32(1):17, 2012; See also *State Preemption Law: The battle for local control of lawn/activist/documents/StatePreemption.pdf*.
- 2 See *Montgomery County v. Complete Lawn Care, Inc.*, No. 427200V, 2019 WL 1950756 (Md. Ct. Spec. App.), May 2, 2019; upheld on appeal, July 12, 2019.
- 3 See U.S. Map of U.S. Pesticide Reform, <https://www.beyondpesticides.org/programs/lawns-and-landscapes/tools-for-change>.